Supreme Court, U.S.
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No. 10-616

In the Supreme Court of the United States

THOMAS JOHN SALZANO
Petitioner,

v.

NORTH JERSEY MEDIA GROUP INC, d/b/a THE RECORD, NORTHJERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA MCKAY, and JONATHAN MARKEY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

REPLY BRIEF

Thomas J. Salzano
Pro Se Petitioner
20 Argyle St.
Glen Ridge, NJ 07028
(973) 449-1593
tjs234@nyu.edu

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REPLY BRIEF FOR *PRO SE* PETITIONER[1]

Introduction

Respondents brief in opposition ("Resp. Opp.") illustrates that there is substantial confusion about the critically important First Amendment issues that *pro se* petitioner raised, and thus that there is a compelling need for clarification and unification on these issues from this Court. It cannot be denied that the courts are deeply and intractably divided on whether or not a clear showing of actual malice will overcome invocation of the fair report *privilege* protection in a defamation case. Indeed, respondents have utterly failed to introduce any plausible explanations why a *privilege* such as fair report outweighs a private plaintiff's ability to vindicate his name and seek damages if a publisher or media outlet can be found to clearly have made defamatory comments regarding said individual with actual malice or with reckless disregard of the truth. In this regard it becomes clear that the Second Restatement of Torts Section 611 Comment(s) (a) & (b), relied on by the court below, are plainly unconstitutional and antithetical to this Court's actual malice jurisprudence. There is similar disparity as to whether the initial pleadings exception recognized in the Second Restatement of Torts

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[1] *Pro se* petitioner ("I, me, myself") is twenty eight years old and not an attorney at law and has received no legal advice or assistance in formulating the instant response. All case law(s), statute(s) and or citation(s) herein were researched solely by me. Therefore, I ask this High Court to continue to review my *pro se* response broadly and liberally.

Section 611 Comment (e) and adopted by a large number of courts overcomes the fair report privilege defense and when not recognized, whether a procedural due process violation may occur.

Moreover, respondents cannot deny that the issues raised in my petition are of great national importance in which resolution by this Court is warranted. Indeed their perfunctory opposition acknowledge the issues importance which is further confirmed by the 19 amicus curiae who played a pivotal role in joining in the argument below, including the New York Times, Wall Street Journal, ABC, Inc., NBC, Inc., to name a few. Respondents also make no effort to rebut the fact that the questions presented were all definitively ruled on by the courts below or that I *can* clearly and convincingly show the instant defamatory articles were made with actual malice due to the undisputed and quite telling facts I introduced (without the aid of discovery) on the record below. Thus, this case presents the appropriate vehicle through which this Court can rule on the issues.

And lastly, when the fair report privilege's fairness and accuracy analysis or "gist" test was applied in this case, the New Jersey Supreme Court was decisively split 3-3 on the issue, garnering no majority vote. Because of this equally divided, deadlocked 3-3 vote which occasioned a spirited joint dissent, respondents essentially escaped liability only as a result of a procedural technicality in which the court below upheld

the findings of the intermediate court which *would have* held the complained of articles were fair and accurate[2].

In sum, respondents' opposition to the instant petition rests in large part on flawed procedural grounds as they skirt the substantive issues. Further, their effort to divert attention from the holding below is a telling concession that said decision cannot be defended. Thus, there can be no more accurate an illustration of the need for this Court's intervention in this matter as I have carried my burden of demonstrating compelling reasons for my petition to be granted and I respectfully submit that certiorari should be granted.

I. Respondents Attempt to Avoid Review Lacks Merit and the Refusal to Defend the Merits of the Decision Below Confirms that Court's Error

Respondents do not even pretend to defend the decision below based on its finding that actual malice cannot overcome the fair report privilege once a defamatory report is *allegedly* determined to be fair and accurate. That is because there is nothing in the decisions of this Court that would imply or suggest the

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[2] In actuality, the intermediate court *did not* base its holding on fair report privilege grounds because that court *stripped* respondents of fair report privilege protection altogether citing the Restatement (Second) of Torts Section 611 Comment e. (The New Jersey Supreme Court later reversed this aspect of the appellate division's decision.) Thus, the appellate division's finding of "fairness and accuracy" was purely hypothetical and amounted to nothing more than an exercise in discretion and in the end would have been erroneous.

narrow scope in which this Court spoke regarding knowingly false speech. This Court has resoundingly rejected any notion that speech uttered with proof of actual malice is ever protected by the First Amendment. See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any **except the knowing or reckless falsehood.**"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality) ("[c]alculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech,"); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) ("[b]ut the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("[f]alse statements of fact are particularly valueless" and should be penalized under defamation law when the "statement was made with knowledge that it was false or with reckless disregard of whether it was false or not."); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966) ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth").

Thus, instead of grappling with an otherwise indefensible finding below, respondents attempt to raise opposition based on jurisdiction. Respondents assert that whether actual malice defeats the fair report privilege, "[c]learly fall[s] within this Court's holding in

Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), that States are free to make their own standards regarding libel law..." See Resp. Opp. at 3; Also see Resp. Opp at 12 ("[t]his Court has encouraged States in *Gertz* to fashion their own defamation law with certain minimal safeguards."). While technically correct, it misses the point in the instant matter and is thus misleading. Although this Court in *Gertz* permitted States to "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," 418 U.S. at 345-46, that decision was based on this Court's desire to make recovery *less* onerous and *more* flexible to private plaintiffs[3] who could not meet the demanding actual malice standard. *Gertz* never permitted the States to categorically deny a plaintiff a chance at recovery when actual malice can be definitively proven by him to defeat a reporting *privilege*, even if a defamatory report is "allegedly" fair and accurate or *eliminate* media liability when analysis under the fair report privilege is deadlocked by a court.

By sweeping the substantive issues raised aside through their misperceived procedural argument, respondents are seeking to have this Court find acceptable that even if one knows what one is

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[3] Although I am a private individual and *should* be held under the negligence standard, I am able to clearly make a showing that respondents acted out of actual malice. Thus, a defamation plaintiff in my situation *should be* permitted to go forward with claims *regardless* of a privilege.

publishing is false, one can still escape liability under the fair report privilege once it is determined that the *knowing falsehood* was *fairly and accurately recited*. Such a proposition directly refutes this Court's repeated command that knowingly false statements of fact are never protected under the First Amendment. *See* previous citations p. 4. Likewise, there are no countervailing benefits or legitimate interest of the public in being informed of knowingly false information. Plainly, when a plaintiff has clear proof of actual malice, this cannot be overlooked nor outweighed by a media "privilege." Yet, this is what precisely occurred in this case, and which is gradually occurring nationwide and the decision below only exacerbates an imbalanced rule forbidding any injured individual to recover defamation damages even if the defendant definitively knew said information was false, so long as it was fairly and accurately attributed to any *unproven* (and in this case false) defamatory paper filed in court. It gives the green light to proliferate yellow journalism.

Respondents further contention that this Court lacks jurisdiction to review the instant matter because "[t]his Court has never determined the fair report privilege to be a federal issue..." Resp. Opp at 10, does not by any means suggest a federal or constitutional issue ceases to exist. Moreover, and to the contrary of respondents belief, this Court *has* determined issues of defamatory statements fairness and accuracy in the disposition of the case *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), even if not

specifically termed as analysis under the "fair report" privilege. *Bresler* involved a newspaper report of a community meeting concerning local government matters, in which Bresler was repeatedly accused by opposing members as engaging in "blackmail" with his negotiations with city officials. See *Id* at 13. Although the use of the world 'blackmail' *truthfully* occurred and the newspapers reported such occurrence, Bresler believed that the newspapers should be held liable for defamation because "blackmail" is a criminal act and the reporters knew he had not committed the crime of blackmail. This Court held differently.

> "The Greenbelt News Review was performing its wholly legitimate function as a community newspaper when it published **full** reports of these public debates in its news columns. **If the reports had been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meetings,** this would be a different case. **But the reports were accurate and full**...Bresler's proposal was **accurately and fully described in each article**...
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> **********
>
> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words

> were charging Bresler with the commission of a criminal offense... [t]he record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Bresler, 398 U.S. at 13-14. See also *Wolston v. Reader Digest Association, Inc.*, 443 U.S. 157, 169 (1979) ("The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975). As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection . . . , we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.")

In the instant case the word "stealing" was used *without* qualification to report an alleged "fraudulent transfer" allegation under Title 11 of the Bankruptcy Code Section 548. Indeed, this word was nowhere in the complaint and could not be implied or inferred from the complaint. This was confirmed by the prolific dissent of three Justices below in deadlock with the other three Justices, who unequivocally determined that a fair reading of Adversary Proceeding 06-01403 ("A.P. 06-01403") as compared to the "news articles" were neither fair nor accurate:

> "This news story has all of the elements that cry out for this Court to pull aside the cloak of privilege, for it misleads by innuendo, insinuates criminal prosecutions are afoot, and implies distortion. It does not qualify as a news report that is full, fair and accurate."

See Petitioner's Appendix ("App.") 59a. The dissent further found:

> "[t]he 'sting' of the word choice [stealing] is far harsher than the truth, and that choosing that value-laden word...created a news report that was both unfair and inaccurate... [the word] **'steal' carries with it the clear connotation of a crime, together with its attendant evil-minded mens rea. None of that is faithful to the actual allegations made in the Bankruptcy Court by the Trustee.**"

See App 55a-56a. Despite these undisputed facts and such strong condemnation by the dissent, the three plurality inexplicably affirmed the "hypothetical" portion of the intermediate court's decision.

Equally unavailing is respondents assertion that by allowing a plaintiff to show actual malice and overcome the fair report privilege, this somehow "[u]ndermines the rationale for the fair report privilege, without which

it would be practically impossible for the media to cover public events..." Resp. Opp. at 11. However that contention is illogical and unpersuasive and this Court dispelled a similar protestation raised in *Herbert v. Lando*, 441 U.S. 153 (1979) which deserves no less application in the present matter:

> "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation...**If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more that what our cases contemplate and does not abridge either freedom of speech or of the press**... Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct...constitutional values will not be threatened."

See *Lando*, 441 U.S., 172-173. Clearly, the fair report privilege is intended to provide media protection in reporting possibly erroneous information or false

statements, *not outright knowingly false statements* made in reckless disregard of the truth. Thus, just as *New York Times v. Sullivan*, 376 U.S. 254 (1964) provided a constitutional privilege designed to counter the effect of criticism of official conduct and deter protected speech, this Court should engraft a similar federal rule that speech uttered with actual malice *always* exceeds constitutional protections and thus defeats any claimed "privilege." This would remain entirely consistent with this Court's long recognition that:

> "[t]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty...[and which] does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.'"

Dun Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 757-758 (1985); *Gertz* at 341 citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart concurring opinion). States that are unwilling to allow plaintiffs the opportunity to prove actual malice, "an extremely powerful antidote to the inducement to media self-censorship," *Gertz* at 342, carries a serious injustice and "substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation." *Id*

at 343. This is especially true with regards to private individuals in which this Court has recognized the State has a "correspondingly greater" interest in allowing recovery. *Id* at 344. See also *Gertz v. Robert Welch, Inc.*, 680 F. 2d 527, 535, 539-540 (7th Cir., 1982) (affirming trial court's disallowing Welch of conditional privilege "to report on public proceedings in which defamatory statements have been made about private individuals" because "[t]he evidence...supports the jury's finding of actual malice. To the extent that the conditional privilege for reports of government proceedings attaches to this case, it was overcome by a showing of abuse of the privilege. The evidence of actual malice subsumes a breach of duty which satisfies the negligence standard applicable to the bulk of the defamatory statements made in the article.")

Respondents also take serious issue with my citing *Herbert v. Lando, supra.*, as demonstrating this Court's rejection of a First Amendment absolute privilege for media libel defendants. In respondents view, this Court's resolution of that case must be strictly confined to the context of editorial process alone and "a flat prohibition against any 'absolute' privilege in defamation cases, even common law privileges such as fair report" is not what this Court intended. Resp. Opp. at 12. Respondents' constricted interpretation of the *Lando* decision is incorrect in light of this Court's various pronouncements in differing contexts that the press only commands a conditional privilege in reporting and not an absolute:

> "If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation...Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."

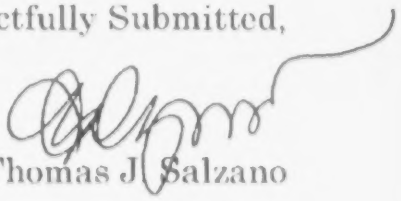
Gertz, 323 U.S. at 341 (internal citations omitted) (emphasis added). And this has been the long-standing view of this Court. See *New York Times Co.*, 376 U.S. at 293 (Black, J., concurring); *Garrison v. State of Louisiana*, 379 U.S. at 80 (Douglas, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (opinion of Black, J.). That respondents' sense the need to minimize and justify the differences in application of conditional privileges by this Court in some circumstances but not others suggests an understandable intellectual discomfort with how the court below ruled. It also verifies the vast disparity and cloud of uncertainty from jurisdiction to jurisdiction that exists on this issue of clear constitutional significance which this Court should affirmatively rule on.

CONCLUSION

Even if "this Petition seeks review of an issue this Court rarely entertains" Resp. Opp. at 14, this case presents all the more compelling reasons why this Court should intervene: the overwhelming divide on the issues

from jurisdiction to jurisdiction, the undeniable level of national importance said issue raises as attested by the 19 amicus curiae who intervened and participated below, in addition to the clearly erroneous holding of the 3 justice plurality. And the clear and unwavering conviction of the 3 dissenting justices only magnifies the serious injustice that has befallen me. The grant of certiorari is warranted.

Respectfully Submitted,



Thomas J. Salzano

Dated: January 14, 2011

Pro Se Petitioner